

The New Title IX: Dos & Don'ts for Sexual Harassment Investigations



Southwestern Michigan School Business Officials

Cristina T. Patzelt
March 10, 2022



1

Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations. Future legal developments may affect these topics.
- This training is not intended to satisfy the comprehensive training requirements for Title IX Coordinators, Investigators, Decision-Makers, and Appeals Officers.

2

Legal Landscape

3

Title IX

*"No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."*

20 USC 1681

4

Title IX Has Broad Application

- Academic
- Extracurricular
- Education
- Athletics
- All school programs, on school transportation, in school-sponsored programs taking place at another location, etc.

5

Scope of New Regulations

- Effective August 14, 2020 (do not apply retroactively)
- Focus on sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment
- Schools still obligated to address other forms of sex discrimination and unlawful harassment under other policies and laws

6

New Regulations – Big Changes

- **All** staff have reporting obligation
- Eliminates “single investigator” model; Investigator, Decision-Maker, Appeals Officer
- Significant changes to investigation process
- Emphasis on due process, and constitutional protections
- Emphasis on impartiality
- 7-year record retention requirement
- Parties entitled to Advisor
- New Policy, Training, and Documentation requirements

7

Key Roles

- Title IX Coordinator: Oversees investigation and coordinates school's compliance with Title IX
- Investigator: Conducts investigation process
- Decision-Maker: Makes determination of responsibility
- Appeals Officer: Hears appeals of dismissal and determination of responsibility
- Informal Resolution Facilitator: Facilitates informal resolution process where parties have agreed to informal resolution
- Investigator, Decision-Maker, Appeals Officer must all be different people
- All key roles must be impartial! No conflict of interest or bias towards either party

8

Training Mandate

- All employees: reporting requirements
- Investigators, T9 coordinators, decision-makers, appeal officers, facilitators
 - Investigation, credibility, evidence
 - Report and rationale-writing
 - Managing interview process, appeals, informal resolution
- ***This presentation does not fulfill training requirements!***

9



DOs



DON'Ts

Dos

- Identify Title IX Coordinator
- Train Staff

Don'ts

- Act in Key Role w/o training
- Act in Key Role if conflict of interest or bias

10

New Terminology

- Alleged Victim ➡ **Complainant**
- Alleged Perpetrator/Alleged Harasser ➡ **Respondent**
- Complaint, Investigation, and Resolution ➡ **Grievance Process**
- Educational Institution ➡ **Recipient**
- Interim Measures ➡ **Supportive Measures**

11

New Definition of Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (new stricter definition)

12

Consent

- Term not defined in regulations
- District must define term in its policy
- How does your policy define consent?
 - Consider absence or negation of consent, and capacity to consent
- Persons in key Title IX roles must know how to apply your consent definition consistently, impartially, and in accordance with policy

13

Quid Pro Quo

- Recipient's *employee* conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- **New:** only applicable to employee as Respondent; not applicable to Respondent volunteer, student etc.

14

Hostile Environment

- "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity."
- "Education program" is any location, event, or circumstance over which the recipient exhibits substantial control over both the Respondent and the context in which the harassment occurred.

15

Staff/Student Conduct

- Sexual conduct between a school employee and a student is ***always*** prohibited
- Consent is irrelevant
- May result in criminal charges

16



DOs



DON'Ts

Dos

- Identify Title IX Coordinator
- Train Staff
- Review new definitions in law and policy

Don'ts

- Act in Key Role w/o training
- Act in Key Role if conflict of interest or bias

17

Reporting and Responding to Sexual Harassment Under Title IX

18

How to Make a Report

- How?
 - Students can report to any school employee or reports can be sent directly to Title IX Coordinator
 - Mail, telephone, or email, or by any means that results in Title IX Coordinator receiving the person's report
 - Employees must convey report they receive to Title IX Coordinator
- When?
 - Reports can be made anytime!
 - Employees must convey reports to Title IX Coordinator **promptly**.

19

Employee Must Convey Report Promptly

- Check your policy for timelines!
- TLF Policy requires any school employee who receives a report of sexual harassment or has actual knowledge of sexual harassment to convey that information to the Title IX Coordinator **by the end of the next business day.**
- If you see something, say something!
- Noncompliance = discipline

20

Responding to Report

- Title IX Coordinator must, upon receipt of report:
 - Contact Complainant (alleged victim) to discuss “supportive measures”
 - Inform Complainant of “supportive measures” available
 - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference

21

Supportive Measures

- Available before, during, and after investigation, **and** if no Formal Complaint filed
- Title IX Coordinator oversees implementation
- Must be:
 - Non-disciplinary
 - Non-punitive
 - Individualized
 - Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening the other party

22

Supportive Measures

- Examples: Counseling, work/class schedule changes, increased monitoring
- Does *not* include anything that completely removes Respondent from an activity except under *very limited* circumstances
 - Removal is considered punitive, except:
 - For students: emergency removal permitted
 - For staff: administrative leave permitted
- Document whether supportive measures were offered and which were taken
- Keep confidential to extent possible while still complying with Title IX requirements

23



DOs



DON'Ts

Dos

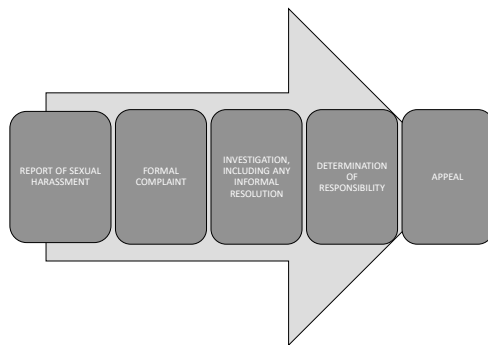
- Identify Title IX Coordinator
- Train Staff
- Review new definitions in law and policy
- Respond promptly to reports
- Offer supportive measures

Don'ts

- Act in Key Role w/o training
- Act in Key Role if conflict of interest or bias
- Remove student unless emergency removal

24

Title IX Grievance Process



25

Grievance Process Roadmap

1. Report of sexual harassment
2. Formal Complaint
 - Written, signed by Complainant or Title IX Coordinator
3. Investigation or Informal Resolution
 - Respondent presumed not responsible
4. Determination of Responsibility
 - Decision-Maker makes determination
 - Cannot issue discipline or sanctions until DoR
5. Appeal

26

Investigation General Considerations

- School has burden of proof and burden to “gather evidence sufficient to reach a determination of responsibility”
- Provide required written notices
- Standard of evidence must be same for all complaints (employee and student)
 - Preponderance of evidence recommended
- Reasonably prompt timeline
- Respondent presumed not responsible
- Consult your policy for specific procedures!

27

Advisor

- Parties may, but are not required to, select an advisor of their choice to assist them during Grievance Process
- School cannot not restrict who serves as advisor
- Person can refuse request to be advisor
- Advisor will:
 - Accompany party to interviews, meetings
 - Discuss potential relevant evidence and witnesses w/ party
 - Review evidence and investigation report and help prepare responses
 - Be familiar w/ Title IX policy and procedures

28

Law Enforcement Involvement

- Does *not* relieve school of Title IX obligation to investigate
- Do *not* use police involvement as excuse not to investigate
- Do *not* wait for criminal conclusion
- Can ***briefly*** delay Title IX investigation for concurrent criminal investigation

29



DOs



DON'Ts

Dos

- Identify Title IX Coordinator
- Train Staff
- Review new definitions in law and policy
- Respond promptly to reports
- Offer supportive measures

Don'ts

- Act in Key Role w/o training
- Act in Key Role if conflict of interest or bias
- Remove student unless emergency removal
- Delay, postpone, or halt investigation

30

CAUTION: Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography, **CALL LAW ENFORCEMENT**
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

31

Evidence Review

- Before the investigation report is completed, the investigator must send (in electronic or hard copy) the parties and their advisors **all evidence** obtained in the investigation so that they can respond to the evidence before the investigator finalizes the report
- Parties must be given **at least 10 days** to submit a written response to the evidence
- Investigator must consider any responses received before completing the report

32

Investigation Report: What to Include

- Parties' information (+ advisor name, if any)
- Investigator's information (+ training verification and no conflict statement)
- Chronology
- Nature of Allegations
- Summary of Evidence (e.g., interview summaries, descriptions of physical evidence)
- Findings of Fact
- But **NO** Determination of Responsibility

33



DOs



DON'Ts

Dos

- Identify Title IX Coordinator
- Train Staff
- Review new definitions in law and policy
- Respond promptly to reports
- Offer supportive measures
- Provide parties evidence and investigation report for review and response

Don'ts

- Act in Key Role w/o training
- Act in Key Role if conflict of interest or bias
- Remove student unless emergency removal
- Delay, postpone, or halt investigation
- Make decision as Investigator

34

Determination of Responsibility Process

After the parties receive the investigation report but before the Decision-Maker makes the responsibility determination, the Decision-Maker must:

- Allow each party 10 days to review and respond to investigation report;
- Allow each party to submit written, relevant questions for any party or witness to answer;
- Provide each party the answers to the questions; and
- Allow for limited follow-up questions from each party
- Explain to party submitting question basis for excluding any questions

35



DOs



DON'Ts

Dos

- Identify Title IX Coordinator
- Train Staff
- Review new definitions in law and policy
- Respond promptly to reports
- Offer supportive measures
- Provide parties evidence and investigation report for review and response

Don'ts

- Act in Key Role w/o training
- Act in Key Role if conflict of interest or bias
- Remove student unless emergency removal
- Delay, postpone, or halt investigation
- Make decision as Investigator
- Discipline student before Grievance Process completed

36

Don't Be Deliberately Indifferent

- Schools must not be ***deliberately indifferent*** to sexual harassment.
- Deliberate Indifference = failure to respond reasonably in light of known circumstances
- School must respond in reasonably prompt time frame
- Take complaints seriously. Report behavior that may be sexual harassment; do not hope it will “just go away.”

37

THANK YOU!

@THRNLAW

38